

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 66

GEORGE GARCIA,

Appellant.

20 Eagle Street
Albany, New York
September 13, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

MATTHEW BOVA
Attorney for Appellant
120 Wall Street Floor 28
New York City, New York, 10005

STEVEN C. WU
Attorney for Respondent
163 West 125th Street 733
New York, New York 10027

ANDREW W. AMEND
Attorney for Intervenor
28 Liberty Street Floor 14
New York, New York 10005-1495

Christy Wright
Official Court Transcriber



1 CHIEF JUDGE WILSON: The next case is Number 66,
2 People v. George Garcia.

3 MR. BOVA: May it please the court. Matthew Bova
4 for Mr. Garcia. I would request three minutes for
5 rebuttal, please.

6 CHIEF JUDGE WILSON: Yes.

7 MR. BOVA: The Supreme Court has already decided
8 the standing issue that is currently being litigated before
9 this court. Staub, Shuttlesworth, and Smith all confirm
10 with, not ambiguous language, crystal clear language, and
11 just to quote it, because I think it's important for the
12 words to get their day, because this issue is being
13 litigated as if we're operating on sort of a blank canvas
14 but we're certainly not.

15 The Supreme Court has, "Uniformly held that the
16 failure to apply for a license under an ordinance, which on
17 its faiths, violates the Constitution, does not preclude
18 review in this court of a judgment of a conviction under
19 such an ordinance. The Constitution can hardly be thought
20 to deny to one subject, and to the restraints of such an
21 ordinance, the right to attack its constitutionality
22 because he has not yielded it to its demands."

23 That's the Supreme Court in Staub. That rule was
24 affirmed in Smith and Shuttlesworth. That - - - the
25 government's argument now is - - - well, at first the

1 government's argument was, that's limited to the First
2 Amendment, but Smith was a Supreme Court case that enforced
3 this rule that you do not have to submit and try to comply
4 with an unconstitutional licensing scheme in order to later
5 challenge it. Smith held - - - enforced that rule, and
6 Smith was not a First Amendment case. It was a substantive
7 due process case. It was basically a - - -

8 JUDGE CANNATARO: Let's assume we agree. So how
9 do we get our facial challenge to - - - to give life to
10 those words that you just said.

11 MR. BOVA: So what Shuttlesworth, Smith, and
12 Staub confirm is that when you're attacking the standard
13 itself, you do not have to try to circumvent and surmount
14 that standard in order to later have standing. If the
15 standard itself is facially valid, and you simply want to
16 argue that as it was applied in your case, for example,
17 that the licensing official just went off the rails and
18 improperly denied your application because of your unique
19 facts, that has to be litigated. That has to be, as the
20 Chief Judge was explaining in terms of the way of thinking
21 about that, exhausted. The same thing is true when it
22 comes to a - - - when - - - when it comes to an order that
23 a court issues. In order to - - - you cannot just violate
24 a judicial order or an injunction. You have to challenge
25 that in court.

1 But Shuttlesworth, Smith, and Staub confirm that
2 when it is an unconstitutional statute or ordinance, you
3 would not have do - - -

4 JUDGE TROUTMAN: So was it - - -

5 JUDGE CANNATARO: We can do the facial challenge
6 right here, right now? This case is bringing that facial
7 challenge to us? Is that what you're saying?

8 MR. BOVA: Yes, so the facial challenge here is
9 to the proper cause requirement. So the proper cause
10 requirement has been facially invalidated. The remaining
11 question then is a question basically of - - - of - - - of
12 traceability and remedy.

13 JUDGE TROUTMAN: What about the - - - you were
14 speaking about the statue. Are you saying that the entire
15 New York statute is thrown out the window and New York can
16 no longer license people, so preservation is not required?

17 MR. BOVA: No, not at all. No, licensing is
18 permissible. The problem is licensing is unconstitutional
19 when you have an unconstitutional licensing standard. I
20 mean, the arguments really just beg the question, of course
21 licensing - - -

22 JUDGE TROUTMAN: Which parts are
23 unconstitutional?

24 MR. BOVA: So the proper cause standard is
25 unconstitutional.

1 JUDGE CANNATARO: But I understood your quotes to
2 those prior cases to speak about submitting yourself to an
3 unconstitutional regime, not to a regime that has one
4 unconstitutional element. Am I misunderstanding your
5 quote, or what this case is on?

6 MR. BOVA: No, the number of - - - the question
7 whether there's one unconstitutional standard, or whether
8 one of five is unconstitutional, whether ten out of ten is
9 unconstitutional, that doesn't matter. The bottom line is
10 when the - - - when the statute or ordinance has an
11 unconstitutional standard. Proper cause standard, which
12 Bruen held was unconstitutional. My client, Mr. Garcia,
13 and anyone else did not have to try to satisfy that first,
14 lose, and then - - - and then takes - - - try to take - - -

15 JUDGE CANNATARO: But doesn't that fly in the
16 face of the Kavanaugh and the Alito concurrences where they
17 sort of go out of their way to say, we're not saying
18 there's no such thing as a constitutional licensing regime.
19 They exist. So I think the elements versus totality
20 difference, distinction is important.

21 MR. BOVA: No, but what those opinions are
22 holding, and the same thing with the majority opinion in
23 Bruen, is that you can have some constitutional licensing
24 requirements. You can have age restrictions.

25 JUDGE HALLIGAN: To that end you mentioned

1 traceability.

2 MR. BOVA: Yes, Your Honor.

3 JUDGE HALLIGAN: You said we've come to
4 traceability. So how can we ascertain whether or not any
5 alleged injury your client might've suffered from being
6 subjected to a licensing regime that included proper cause,
7 is traceable to the proper cause requirement if there has
8 not been a litigation in the first instance that figures
9 out whether there might be other disqualifying factors that
10 would've kept your client, or any other defendant, from
11 getting a license. I'm not sure how we could know it's
12 traceable there.

13 MR. BOVA: Well, the government hasn't identified
14 even any - - - hasn't even tried to speculate as to any
15 possible barriers, alternative to proper cause. But the
16 answer there is a remand. I mean, I think really what
17 we're talking about here are two choices. Do we engage in
18 the limited remedy of remand, or do we forever choke off
19 appellate review of a fundamental constitutional claim.
20 And I think that the Constitution - - -

21 JUDGE HALLIGAN: That - - - go ahead.

22 MR. BOVA: I think that the Constitution says
23 when you have those two options, we should favor the
24 constitutional right, and if all we're asking for is a
25 narrow remand to develop the record on that issue, that

1 should be the remedy. Particularly where, you know, for
2 example, in Mr. Garcia's case, he had a Utah license, the
3 government is purely speculating that there may be some
4 possible provisions. There's no - - -

5 JUDGE HALLIGAN: What would the narrow issue be
6 for which you would seek a remand?

7 MR. BOVA: So the - - - so the questions that
8 would be developed on remand would be, one, are there any -
9 - - are there - - - are there any provisions that would
10 have applied to Mr. Garcia so as to bar him from a license,
11 and assuming there are, are any of those provi - - - are
12 those provisions also constitutional. I mean, for example,
13 the good moral character provision is another alternative
14 provision in statute. That is likely more unconstitutional
15 than proper cause. I don't think it - - - it's hard to
16 imagine a standard more subjective than having one's rights
17 hinge on a - - - on a local government agent's assessment
18 of one's good moral character.

19 And the government has not even tried in the six
20 cases before this court where that issue is all in play to
21 even suggest that there's a historical tradition justifying
22 such an arbitrary standard. So that's all that - - - that
23 - - - that is the way to handle that is it gets remanded
24 for a - - - for a hearing on those issues, and the question
25 of whether there are alternative justifications for denying

1 the license can be hashed out. And I think that also gets
2 - - -

3 JUDGE TROUTMAN: So are you saying that
4 determinations in all these - - - in all cases where a
5 person such as your client has a license elsewhere, they
6 have - - - it is okay for them to come in, not apply, and
7 go through a criminal proceeding, and then decide that it's
8 unconstitutional because the - - - there was - - - there
9 was no showing by the People that they would've otherwise
10 been disqualified?

11 MR. BOVA: No, so - - - well, so the Supreme
12 Court has said that the question of whether you do the
13 upfront application, whether you try to - - - whether you
14 try to surmount the unconstitutional standard, you don't
15 have to do that first in order to later have a defense.

16 JUDGE TROUTMAN: No, what I'm saying to you is
17 that what you're clearly saying is New York can't require
18 people to apply?

19 MR. BOVA: Where New York has an unconstitutional
20 licensing scheme, yes. That is the rule from Staubs,
21 Smith, and Shuttlesworth.

22 JUDGE TROUTMAN: I understand, but you're saying
23 if the proper cause part was what the Supreme Court struck
24 down, correct?

25 MR. BOVA: Yes, Your Honor.

1 JUDGE TROUTMAN: So that - - - so now there's a
2 blanket prohibition with respect to other parts of the
3 statute?

4 MR. BOVA: No, it's simply that the government is
5 suggesting that what Mr. Garcia had to do - - -

6 JUDGE TROUTMAN: It's their burden to show that
7 he would not otherwise qualify?

8 MR. BOVA: Yes, and what the government is
9 suggesting is that Mr. Garcia had to look at
10 unconstitutional - - - an unconstitutional licensing
11 provision in the face, and say I have to now apply - - -
12 try to somehow persuade the local official that I can
13 satisfy the unconstitutional standard, get it denied, and
14 only then do I have a defense. And that is exactly what
15 *Staubs, Smith, and Shuttlesworth* reject.

16 JUDGE GARCIA: But isn't your argument really
17 that would he have an obligation to do or show that that's
18 why - - - what they relied on in denying him a license?
19 Right? I mean, if you apply and they say you haven't shown
20 this extra thing, which is now, everyone agrees is
21 unconstitutional, okay, then you have that. But there
22 might have been another reason, and now what you're asking
23 is for this court to send it back for a proceeding like
24 that to take place in this criminal proceeding, right?
25 Like, why didn't he have an obligation to apply for a

1 license and get a determination that it was that particular
2 provision that kept him from getting a carry permit?

3 MR. BOVA: Well, because you could say the same
4 thing about any unconstitutional scheme. Almost every
5 licensing scheme has many provisions, but the Supreme Court
6 has never said, well, every single one has to be found
7 unconstitutional in order for you not to have to first
8 apply.

9 JUDGE GARCIA: Let's say there's a - - - one of
10 your examples, let's say there's a, you know, you have to
11 get a license to have a - - - to speak. It's a First
12 Amendment issue. And there are ten things in that statute
13 that can prevent you from getting a license, and one of
14 them is, you know, the podium you want to speak of is - - -
15 is a certain level, and for some reason that's tossed.
16 Okay, that's unconstitutional. Now, everyone can just say,
17 well, I - - - you know, I didn't need a permit, because,
18 you know, look at that podium provision in there. And
19 there might be nine reasons that person under the statute
20 wouldn't have gotten a permit.

21 MR. BOVA: No, so the question of standing is
22 resolved by - - - by looking at the statute and saying does
23 it have an unconstitutional provision. Then we look to
24 Staub and Shuttlesworth, which hold that you don't have to
25 apply. The question though - - -

1 JUDGE HALLIGAN: Shuttlesworth and Staub, was
2 there any indication, and I - - - I don't recall, that the
3 individuals would clearly have been ineligible for a
4 license for some reason other than the ground that they
5 were saying was impermissible?

6 MR. BOVA: No, no. I mean - - -

7 JUDGE HALLIGAN: So that - - - that's different
8 here though, right? I mean, here we - - - because they
9 didn't apply, and there are a number of different grounds,
10 we don't know whether they might have been ineligible for a
11 license in any event.

12 MR. BOVA: But I think though what's happening is
13 the two doctrines are being - - - are being merged
14 together.

15 JUDGE HALLIGAN: Which two?

16 MR. BOVA: So - - - so the standing - - - the
17 standing rule, which governs whether you have to make an
18 application - - -

19 JUDGE HALLIGAN: Yes.

20 MR. BOVA: - - - and the question of
21 traceability. What the Supreme Court is basically saying
22 in Staub, Shuttlesworth, and Smith, is that when a statute
23 is unconstitutional, it's void. A person does not have to
24 try to satisfy it first. But the question of - - -

25 JUDGE HALLIGAN: So what's the - - - what's - - -

1 sorry. What's the genesis of the traceability requirement
2 if it's not part of - - - of standing?

3 MR. BOVA: No, it is. But all I'm saying is
4 that - - - all I'm saying is that traceability comes in
5 when we're looking at whether or not the unconstitutional
6 standard has harmed the individual who is litigating the
7 claim. And so for Mr. Garcia, for example, if there were
8 some other ap - - - some other standard in the - - - in the
9 licensing scheme that could've barred him, then he didn't
10 have to make the application first. He didn't have to
11 first try to surmount the proper cause standard, but he
12 would not have - - - he would not be able to show
13 traceability when litigating the claim as a defense.

14 JUDGE CANNATARO: So New York's attorney
15 licensing regime also has a good moral character element to
16 it, so in this - - - based on your argument, a defendant
17 who's looking at a charge of practicing law without a
18 license, doesn't really have to challenge that element
19 until they're convict - - - or doesn't have to apply for a
20 license and may permissibly challenge that element after
21 conviction saying it was an unconstitutional requirement?

22 MR. BOVA: Right. So yes. I mean, if I
23 understand the hypothetical correctly, I mean, I think
24 that's - - -

25 JUDGE CANNATARO: I'm not sure I understand the

1 hypothetical correctly.

2 MR. BOVA: Well, I mean, maybe I could try to
3 just recreate it a little bit. So if - - - if there's a
4 statute that says that the unlicensed practice of law is a
5 felony, it's not, but let's assume there is one. And it
6 also says that in order to get a license to practice law,
7 you need to show two things. One is, you have to be a
8 really, really good writer, and two is, the local court
9 system has to deem you so worthy of a license that we can
10 confirm that justice will absolutely be - - -

11 JUDGE CANNATARO: No, no. Just - - - they have
12 to deem you a person of good moral character. We have
13 character and fitness requirements.

14 MR. BOVA: Well, but that in the lawyer context,
15 that's a constitutional standard, so I'm just - - - I'm
16 just trying to create a hypothetical with clearly
17 unconstitutional standards. The fact that there's two - -
18 - that fact that there - - - one - - - one is
19 unconstitutional, two is unconstitutional, four is
20 unconstitutional, it really doesn't matter. The bottom
21 line is that - - - that attorney can hold him or herself
22 out as a lawyer because there was an unconstitutional
23 standard in play, and then be able to raise that as a
24 defense. If there was - - - if there was another standard
25 that clearly barred that license, then the claim fails for

1 lack of harm, for lack of traceability.

2 JUDGE RIVERA: Why - - - why isn't it really - -
3 - it really is a facial standard at the end of the day,
4 because don't you have to show that every single
5 requirement is unconstitutional?

6 MR. BOVA: No, because some are also factually
7 inapplicable. And so - - -

8 JUDGE RIVERA: And then it's as applied.

9 MR. BOVA: No, so - - -

10 JUDGE RIVERA: If it's unique to the individual's
11 facts?

12 MR. BOVA: When assessing the remedy and
13 traceability, yes. You do then have to look at - - - at
14 the - - - at each individual. I mean, there may be some
15 people who couldn't satisfy the proper cau - - - who were
16 subject to the proper cause standard, but they're also 16
17 years old. In a case like that, under Smith, Staub, and
18 Shuttlesworth, you didn't have to make the application to
19 have standing later to challenge the proper cause, but you
20 can't show traceability because the age restriction
21 would've prevented you anyway. So I think it's just
22 important when we're thinking about this just to divvy it
23 up between the question of the threshold requirement that
24 you make the application, and then the additional analysis,
25 once we're in court about traceability.

1 And I just want to also say, too, that my - - -
2 Mr. Garcia was also convicted of intent to use unlawfully,
3 not just simple possession, which is a unique issue in this
4 case compared to the rest of the cases. And there is no
5 historical tradition that the government has been able to
6 meet its burden of identifying. That - - -

7 JUDGE GARCIA: How would the traceability work in
8 a criminal case? So the government now - - - it seems to
9 be you're saying, has the burden of showing you wouldn't
10 have gotten a license under one of the other provisions?
11 Is that what would happen here?

12 MR. BOVA: Yes. I mean, I think that that
13 sounds - - -

14 JUDGE GARCIA: What if the defendant says no, I'm
15 not going to cooperate in that kind of inquiry, I'd
16 incriminate myself? You go ahead, try.

17 MR. BOVA: Well, I mean, I think the question of
18 burden at - - - at the remand hearing as to whether there's
19 an alternative basis for denying the license, I think that
20 if - - - if it's, I mean, I - - - I think I can imagine a
21 situation where the burden would rest on the defendant to
22 show that there are no other - - - there are no other
23 grounds for denying the license as well.

24 JUDGE GARCIA: Would this be one of those
25 situations, if it goes back? Would the burden be on the

1 defendant to show that the other provisions don't bar him
2 from getting a license?

3 MR. BOVA: I mean, I don't think - - - I think in
4 a case like this, we would not have a problem with that. I
5 think - - - and I think that also is consistent with the
6 general rule that the challenger has the burden of proving
7 both the unconstitutionality and also injury in fact and
8 traceability. And I'd also, I mean, I can comfortably give
9 that answer too, because I think this record overwhelmingly
10 shows that there's no other constitutional justification
11 for denying Mr. Garcia a license. I see my time - - -

12 JUDGE RIVERA: So that's - - - perhaps I'm just
13 misunderstanding this. I'm dense, it's late, I don't know,
14 but it sounds to me like this last point you made is the
15 facial challenge, that every other provision renders this
16 unconstitutional with respect to your client. Or did I
17 misunderstand what you just said?

18 MR. BOVA: So just as a - - - there are - - -
19 there are other - - - there are other provisions in - - -
20 in the licensing scheme other than proper cause.

21 JUDGE RIVERA: Yes.

22 MR. BOVA: And the question for the re - - - the
23 question for the remand is going to be whether A, those
24 provisions are constitutional, and B, if they are, are they
25 actually applicable to Mr. Garcia.

1 JUDGE RIVERA: Okay. But on A, that strikes me
2 as a facial challenge.

3 MR. BOVA: Well, there may be facial chal - - -

4 JUDGE RIVERA: And your - - - I thought the
5 argument was under Bruen all of those requirements fail.

6 MR. BOVA: No, not all of them.

7 JUDGE RIVERA: Okay.

8 MR. BOVA: Not all of them. I mean, I think - -
9 - I think it's very clear - - -

10 JUDGE RIVERA: What's the constitutional argument
11 on the one that's - - - doesn't fit the not all of them?

12 MR. BOVA: So I think the age restriction for
13 example, the pre - - -

14 JUDGE RIVERA: That doesn't apply to him at all
15 anyway.

16 MR. BOVA: Right. So the on - - - the - - -
17 and - - - and there - - - it's an open question, too, about
18 whether restrictions like substance abuse. I mean, our
19 position is that - - - that - - - that the mere prior act
20 of engaging in the use of a controlled substance does not
21 disarm you. But I think all of those questions just get
22 hashed out at remand and questions also as to good moral
23 character. That too is patently unconstitutional.

24 JUDGE RIVERA: As opposed to you saying this
25 would be the only ground upon which - - - in all those

1 requirements, this is the only ground upon which the
2 defendant could've been denied a license, and here's our
3 arguments why it - - - they should not have been denied a
4 license on that ground.

5 MR. BOVA: No, ultimately the position that we
6 would be raising on - - - on - - - at the hearing would be
7 that, would be that the only - - - the only justification -
8 - -

9 JUDGE RIVERA: Yes.

10 MR. BOVA: - - - that in the - - - in the
11 licensing statute that could apply to Mr. Garcia would've
12 been the proper cause. Everything else was either
13 inapplicable or unconstitutional. That would be ultimately
14 the position we'd have to prevail on at a remand.

15 JUDGE GARCIA: Should the judge then essentially
16 engage in a licensing decision? Like, you would have to
17 provide the information to the judge that you would've
18 provided to New York State to get a license, and the judge
19 makes a determination of whether or not I would issue you a
20 license on these? Are you of good moral character, are you
21 this, are you that, do you fit in these exceptions? Is
22 that what we're asking the trial judge to do here?

23 MR. BOVA: I mean, I don't think necessarily,
24 because if you have a subjective standard that is
25 constitutional, then I think - - - then I think that that

1 would defeat the claim. I mean if the good moral character
2 standard is constitutional, I think that that does - - -
3 that does in many ways sever the traceability point,
4 because we never - - - we never tried to satisfy that
5 either. So - - -

6 CHIEF JUDGE WILSON: And on the remittal, the
7 burden that you are willing to assume, or your client's
8 willing to assume, is it production, or is it proof, and if
9 so, under what standard?

10 MR. BOVA: Well, generally the standard for
11 raising a constitutional challenge is preponderance of the
12 evidence. So I mean, I think that the - - - and I think
13 that's also generally the standard that would govern
14 standing inquiries. So I think that the standard would be
15 that Mr. Garcia would have to - - - would have to show that
16 any other alternative theory is either factually
17 inapplicable, or unconstitutional - - -

18 CHIEF JUDGE WILSON: And the burden to prove that
19 under a preponderance standard?

20 MR. BOVA: Yes, yes. And I - - - because that's
21 just generally consistent with the rules that govern
22 constitutional challenges. Thank you.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. WU: May it please the court. Steven Wu, for
25 the People. On standing, the First Amendment cases the

1 defendant relies upon here are categorically inapplicable.
2 They rely upon a finding that the underlying licensing
3 scheme is, on its face, violates the Constitution. And
4 that is simply not something the Supreme Court found in
5 Bruen here. What defendant conflates is a decision that
6 found a specific requirement that indisputably applied to
7 the plaintiffs there unconstitutional, with something that
8 invalidated the licensing scheme as a whole. And Bruen
9 simply didn't do that. The majority and the concur - - -
10 concurring opinions went out of their way to emphasize that
11 licensing could continue to be imposed, and therefore,
12 states could also impose penalties for failing to comply
13 with the licensing requirement. And the problem with - - -

14 CHIEF JUDGE WILSON: Let me just stop you there
15 for a second. So suppose instead of a proper cause
16 requirement, New York had a - - - a statute that said
17 African Americans can't apply for licenses. Is that
18 facially unconstitutional or no?

19 MR. WU: That requirement might be
20 unconstitutional and should be - - -

21 CHIEF JUDGE WILSON: Is the statute - - - is the
22 statute then facially unconstitutional?

23 MR. WU: If - - - if the underlying licensing
24 scheme is not declared separately unconstitutional, it is
25 not - - -

1 CHIEF JUDGE WILSON: I'm not asking for a
2 declaration - - -

3 MR. WU: - - - unconstitutional to apply for the
4 license.

5 CHIEF JUDGE WILSON: So I'm asking you the
6 following.

7 MR. WU: Understood.

8 CHIEF JUDGE WILSON: Assume that instead of
9 proper cause, it says African Americans cannot obtain a
10 firearm license. And actually New York had a statute like
11 that a long time ago. Assume that's the statute. Is that
12 statute facially unconstitutional?

13 MR. WU: The requirement to satisfy that pro - -
14 - that provision that you identified would be
15 unconstitutional, but the need to submit to the licensing
16 scheme at all would not be. And - - - and again, this is
17 not a point to infer from Bruen. Bruen said two things in
18 its holdings. It said, one, the proper cause requirement
19 could not be enforced. And it said, that holding does not
20 mean that states cannot apply licensing requirements. So
21 the Supreme Court answered what would be necessary in the
22 First Amendment context to find the licensing scheme
23 unconstitutional on its face. It said licensing is
24 permissible here. And the problem with defendant's failure
25 to comply - - -

1 CHIEF JUDGE WILSON: I still - - - I'll try one
2 more time, then I'll give up. Is your answer that my
3 hypothetical statute is not facially unconstitutional?

4 MR. WU: The requirement you identified - - -

5 CHIEF JUDGE WILSON: No, no, the statute?

6 MR. WU: No, but - - - but I - - -

7 CHIEF JUDGE WILSON: The statute?

8 MR. WU: This is the answer to your question.

9 CHIEF JUDGE WILSON: Okay.

10 MR. WU: The specific requirement that is imposed
11 would be unconstitutional, and whether it's requiring
12 someone to not be African American, or requiring someone to
13 establish proper cause, but that is not - - - that doesn't
14 necessarily mean that the need to have a license would be
15 facially unconstitutional.

16 JUDGE HALLIGAN: Doesn't it turn on whether that
17 provision is severable?

18 MR. WU: It - - - it does. And in this case we
19 know it is severable because the legislature literally
20 severed the proper cause requirement in response to Bruen
21 here. And I do think that is the - - - the weight is sort
22 of like square the circle here.

23 JUDGE RIVERA: So let's try these questions this
24 last way. Perhaps this last way, maybe I should not have
25 said that. The provision as described by the Chief Judge

1 is found unconstitutional. The day after that decision,
2 can an African American go seek a license, and would they
3 then have to satisfy the other requirements of the statute?

4 MR. WU: Yes, they would. They absolutely would
5 have to satisfy the other requirements of the statute, and
6 the State would be entitled to say that some of them
7 didn't - - -

8 JUDGE RIVERA: As would anyone else?

9 MR. WU: As would anybody else, and the State
10 would be entitled to say that somebody who didn't even try
11 to apply for a license and didn't get one can be criminally
12 penalized here. And I don't want to spend too much time
13 with standing. The one other thing I do want to say about
14 it is that the reason that standing matters here is in part
15 because of the specific nature of the challenge the
16 defendant is making. What defendant has made clear is that
17 the source of the constitutional problem here is being
18 subjected to the proper cause requirement. That's the
19 predicate for the constitutional claim.

20 But as Judge Halligan said, there's a
21 traceability issue here. We don't know that defendant
22 would've been subjected to the proper cause requirement.
23 We don't know that he would've been denied a license at all
24 if he had actually applied. This is a defendant, unlike
25 others today who had no criminal history, is certainly not

1 under 18, lives in New York, right, has no evident history
2 of drug use, and - - - and when he testified at trial about
3 why he didn't apply for a license, it wasn't because he
4 couldn't establish proper cause or whatever. What he said
5 was he didn't want to undergo the burden and expense of
6 applying for a license in New York. That was his reason
7 given for it. So there is no showing that he would've been
8 denied a license at all, let alone for proper cause. So he
9 can't show that the source of his constitutional problem,
10 which is a proper cause requirement, would have even
11 affected him. That is why he lacks the standing to raise
12 the specific argument that he is making here.

13 JUDGE HALLIGAN: Can I - - - can I ask you about
14 that, so what I'm - - - what I'm grappling with is he was
15 convicted under a statute which he argues is
16 unconstitutional because it rests on a licensing regime,
17 which itself had a component which the Supreme Court said
18 was unconstitutional, right? And - - - and so it seems to
19 me there is a commonsense way in which he was aggrieved by
20 that - - - by that conviction in a way that generally, you
21 know, rests on injury in fact, and traceability and
22 redressability. So why is the traceability analysis more
23 complicated in the way you're identifying?

24 MR. WU: Well, so I would distinguish two ways of
25 understanding standing here. There's no dispute that he

1 has standing to raise a challenge to his criminal
2 conviction because he was, in fact, convicted. That's not
3 what the People's argument is. But the way the defendant
4 has chosen to bring a specific argument to challenge his
5 conviction is to say that he was improperly subjected to
6 the proper cause requirement. That is the collateral
7 challenge he's making. That is the predicate for his
8 challenge to his conviction. And in order to raise that
9 specific argument, he needs to establish that the proper
10 cause requirement would've applied to him, and he hasn't
11 satisfied that. So as - - - as the attorney general said
12 in the previous argument, standing is in a way a misnomer.
13 It's not about standing to challenge his conviction, it's
14 about standing, whether it's prudential Article 3 version,
15 to raise a specific argument that he now relies upon, which
16 would be the same type of argument that the Bruen
17 plaintiffs raised in their civil challenge.

18 JUDGE HALLIGAN: That argument is what,
19 precisely?

20 MR. WU: It is - - - is the version of the
21 argument they have made here, which is that because the
22 proper cause requirement is unconstitutional and applied to
23 me, right, which is the missing - - - applied to me, I
24 cannot be convicted. And again, that - - - that - - -
25 because of the version of the argument that he has chosen

1 to raise, he has helped that burden. I should say,
2 Decastro makes that clear. It's a Second Circuit case, not
3 one from this court. But in Decastro, Decastro looked at
4 two different arguments. One was an argument based upon a
5 predicate challenge to the licensing scheme, and it said
6 there was no standing in this sense of the word to raise
7 that argument, and then it did go on to consider a
8 challenge to the federal conviction under 922 based on
9 other grounds. So it wasn't that the defendant couldn't
10 raise any challenge whatsoever, just the licensing-based
11 one, which is similar to the argument the defendant is
12 raising here.

13 And one very last point on - - - on standing,
14 remand is not a substitute here for what the right question
15 would be and would not be a solution here in any event.
16 The question in this case is what administrative officials,
17 considering a license application from someone who actually
18 wants to get it, would've said if he had applied. But a
19 remand here would not involve the licensing official. The
20 district attorney's office does not grant gun licenses.
21 It's the NYPD and New York City. And defendant's and the
22 prosecutor's burdens here would be topsy-turvy. Defendant
23 would be here arguing, I would never have gotten this
24 license, and I guess the prosecutor would be arguing that
25 he could've gotten this license. And so the incentives

1 would be entirely skewed. And I think what this means is
2 that the remand doesn't actually answer the question that
3 is relevant for the standing question, which is what would
4 a licensing official have done if defendant had actually
5 tried to get a license here. And neither of those would be
6 present.

7 CHIEF JUDGE WILSON: Am I right - - - am I right
8 that in some places, not in New York City, but some other
9 places in New York State, a court is the licensing
10 authority?

11 MR. WU: That is correct. Upstate, outside of
12 New York City, and so - - - and in those - - - and a remand
13 in those situations would not bring in the types of courts
14 that would issue the licenses, is my understanding. It
15 would go back to the local criminal court, not to the
16 licensing officials either.

17 JUDGE HALLIGAN: So if - - - if a defendant in a
18 subsequent case is convicted of CPW and has the view that
19 one of the other components of the - - - of the licensing
20 regime is unconstitutional and your adversary identified a
21 few he thought might fall in that category, is that
22 defendant unable because he or she lacks standing to
23 challenge the conviction if he or she hasn't applied for a
24 license?

25 MR. WU: Well, Bach v. Pataki did recognize a

1 futility exception in this respect, which is if it would be
2 futile to have applied at all and it was clear from the
3 record that that was true, you might be able to get around
4 it.

5 JUDGE HALLIGAN: If for example if you - - - I
6 understand that the prior felony has been litigated in the
7 Third Circuit, but if there was that sort of restriction
8 and you were ineligible for a specific reason you would say
9 that there was standing there, but not if you weren't
10 necessarily otherwise disqualified?

11 MR. WU: Right. There might be under a Second
12 Circuit precedent, a futility exception to applying for a
13 license in those circumstances. And the distinction in
14 this case is that, as I said, it is not clear he would've
15 been denied a license, nor is it clear the specific grounds
16 on which he would've been denied a license, unlike in a
17 case like *Bach v. Pataki* where there was no real dispute
18 that he would've been denied on residency grounds.

19 I do want to address the merits of the Bruen
20 claims before I sit down here, because this case does raise
21 two distinct issues on Bruen that the other cases don't.
22 And one is on the possession with intent to use unlawfully
23 conviction. Bruen itself rebuts the defendant's argument
24 that there is any constitutional entitlement to possess
25 with the intent to use a firearm unlawfully against another

1 person. The Second Amendment right to find in Bruen was
2 limited to law-abiding citizens who use firearms for self-
3 defense, and somebody's intent to use something unlawfully
4 against another is categorically inconsistent with that
5 type of a protection here. And Bruen also went through
6 historical evidence that showed multiple examples of
7 situations where there were regulations of what it called,
8 "well-defined restrictions governing the intent for which
9 one could carry arms". And this case shows a perfect
10 example of the type of conduct for which regulations were
11 historically permissible. This defendant, without any
12 provocation, went to his car, got his firearm out there,
13 and was returning to a club to shoot somebody or threaten
14 them. He was under no threat. He was being followed by
15 nobody. He was engaged in what Bruen would call an intent
16 to create fear and terror in others, and that has been
17 constitutionally permissible as a source of regulation for
18 hundreds of years.

19 JUDGE GARCIA: But isn't the issue, Counsel,
20 really can you have a presumption that that was the intent
21 from conduct protected by the Second Amendment?

22 MR. WU: And that is the second distinct issue,
23 is the operation of the presumption here. As a threshold
24 matter, I will raise just one, the preservation argument on
25 presumption, which is this was obviously not raised below.

1 And preservation here is something that would have been
2 valuable. The court and the parties here spent a
3 considerable amount of time thinking about how to instruct
4 the jury on this exact question. What inferences to draw
5 from possession. And there's no indication that this very
6 conscientious court wouldn't have entertained or thought
7 about ways of changing the instructions to the jury in
8 response to a constitutional concern.

9 So this is a situation where preservation
10 would've been very valuable, and there is nothing that
11 defendant has identified that would have obviously
12 foreclosed a constitutional argument here. When this court
13 considered the presumption in Galindo, it made a point of
14 saying that there was no constitutional objection to the
15 presumption there. Defendant could have raised one here.
16 They've cited no Court of Appeals, Appellate Division,
17 Supreme Court precedent that would have foreclosed such a
18 challenge. So we do think this could be resolved just on
19 preservation alone.

20 On the merits of the presumption, the right test
21 to apply is the one from Ulster County here. And that is
22 because the defendant here is raising a challenge to what
23 he deems to be the rationality of the presumption drawing
24 from the basic fact of possession to the elemental fact of
25 unlawful intent. And what Ulster County made clear is that

1 interpreting that rationality in a case where there's a
2 permissive presumption, you start with the facts of the
3 case. And the facts of the case, as I said, have direct
4 evidence of defendant's intent to use the firearm
5 unlawfully.

6 JUDGE SINGAS: And if there were no facts, would
7 the presumption alone then be unconstitutional?

8 MR. WU: Well, I would say this - - -

9 JUDGE SINGAS: And you don't just rely on that
10 presumption?

11 MR. WU: If there were no facts, then the bare
12 rationality of the presumption alone would actually be
13 presented, and it's not presented here. In the abstract,
14 there - - - our position is that the presumption is, in
15 fact, rational here. And I think the error with
16 defendant's argument is the assumption that the presumption
17 is from otherwise lawful possession of a firearm, and it is
18 not. The presumption here comes, one, from someone's
19 unlicensed possession of a firearm, meaning that the
20 individual has necessarily already violated the law. It is
21 a violation of a law that is intended to determine if
22 somebody has lawful uses for the firearm and can
23 responsibly use it.

24 And so there's a nexus between what the licensing
25 scheme does and the question of lawful intent. And in this

1 case, and in other cases as well, there's a standard
2 instruction that if the defendant is justified, there is no
3 lawful intent. And so this is a case where the possession
4 is from someone who has violated the law, has no justified
5 self-defense need for the firearm, and it is from those
6 facts that the presumption is drawn that there is unlawful
7 intent. And that - - - that is a rational presumption that
8 is a permissive one, and the jury is entitled to accept or
9 reject.

10 JUDGE GARCIA: In a way I see this argument, but
11 I see it in some way based on a different problem, which is
12 to convict of the underlying crime, you need to show the
13 person's unlicensed and under the New York approach to
14 that, that was the defendant's at least burden of
15 production, right? So if that falls, then your unlicensed
16 public carry falls, right?

17 MR. WU: Well, that exact question is not
18 presented in our case, and part of it is because there was
19 no real dispute here, including from defendant's own
20 testimony that he lacked a license. So whoever bore the
21 burden here, it was clear at the trial that defendant
22 lacked a New York license, knew he lacked a New York
23 license, and knew that he had to get licensed here. So
24 this is not a case where I think that problem raises for -
25 - - for us.

1 But I do want to make a point of saying that this
2 is a case where the bare presumption from possession alone,
3 or from unlicensed possession truly was not in effect. The
4 prosecutor made no mention of the presumption during
5 summation, instead spent considerable time outlining the
6 evidence of unlawful intent. So if there is a case where
7 the concern is whether the presumption alone might operate
8 in a way to undermine the defendant's rights, this is
9 certainly not the case to consider the - - - that question.

10 CHIEF JUDGE WILSON: Thank you.

11 MR. WU: Thank you.

12 MR. AMEND: May it please the court. Andrew
13 Amend for the Attorney General. Following his arrest for
14 unlawful gun possession after an altercation with another
15 patron at a nearby nightclub, defendant, George Garcia,
16 said the other patron was lucky the arrest occurred because
17 of what defendant planned to do once he got back to the
18 nightclub. The jury rejected the invitation to find that
19 any threat to defendant, or the girlfriend, provided
20 justification negating the defendant's intent to use the
21 pistol unlawfully against another. At no point in the
22 trial court did defendant argue that his prosecution
23 violated his Second Amendment right to carry a handgun for
24 self-defense, and the Second Amendment challenges he
25 belatedly attempts to raise now are unpreserved, barred by

1 lack of standing, and meritless.

2 I'd like to say a couple of things about
3 preservation that I hope will be considered helpful by the
4 court as highlights, in addition to what very capable
5 counsel have already said. If it were true that there were
6 simply an exception for U.S. Supreme Court precedent that
7 changed the law in New York, we would expect to see a lot
8 more examples of it. And what we actually have is - - - is
9 the opposite. *People v. Walker*, that's in 1988, 71 NY 2d
10 1018. This court applied preservation to bar a claim under
11 *Cruz v. New York* that was decided after the defendant's
12 trial in that case. *People v. Gonzalez*, 55 NY 2d 887,
13 1982. A more recent example, *People versus* - - - *People v.*
14 *Douglas*, 4 NY 3d 777, 2005. That was a claim under
15 *Crawford*, which did apply a new framework to a
16 constitutional right, the right to confrontation.

17 This court reached a confrontation clause issue,
18 but only after noting that the issue had specifically been
19 preserved by the objection at trial. If there were this
20 exception as broad as defendant argues, an awful lot of
21 cases from this court would have had to turn out
22 differently. On standing, I would say that the cases that
23 the defendant cites, including *Smith*, including *Staub*,
24 including *Shuttlesworth*, none of them involved the paradigm
25 we have here where there is a single readily excisable

1 criterion from the licensing statute that is held to be
2 unconstitutional. There was something that made the scheme
3 void in toto, because the conduct itself couldn't be
4 subject to licensing, or the licensing function - - - the
5 licensing regime function systematically with such vast
6 discretion that it was - - - it was void in all its
7 applications.

8 When there is, however, a readily - - - pardon
9 me, excisable provision from a criminal statute, or in this
10 case, it's not even a criminal statute, it was in the
11 licensing regime, the answer is not to say that everyone
12 who violated the statute before gets to go free, it is
13 instead to just excise that provision, and I would cite to
14 this court, People v. Liberta, that's 64 NY 2d 152, in
15 1984, where this court held that the exception to the rape
16 statute for married spouses was unconstitutional.
17 Obviously, the holding was simply that that exception was
18 stricken from the statute, not that everyone who had
19 violated the statute previously and been convicted under it
20 got a free pass because there was one unconstitutional
21 piece in the statute.

22 I'd also like to point out something about
23 standing that counsel haven't really discussed here. This
24 is an individual who could've gotten a premises or
25 restricted carry license by his own claims, which would've

1 been a complete defense to the charges that he now faces,
2 including for unlawful - - - pardon me, possessing a pistol
3 with intent to use it unlawfully. He wouldn't have had to
4 show proper cause, which he claims would be the only
5 impediment, and in fact, there was evidence that he used
6 his gun, other than on this occasion, just to go to
7 shooting ranges - - -

8 CHIEF JUDGE WILSON: Slow that down there for a
9 second. So if he had applied for a, let's say, a home
10 license only, right, he could've gotten that without a
11 proper cause showing.

12 MR. AMEND: Yes.

13 CHIEF JUDGE WILSON: And I think you said that
14 would've provided him a defense against these charges.

15 MR. AMEND: Correct.

16 CHIEF JUDGE WILSON: Including the intent to use
17 unlawfully?

18 MR. AMEND: That is correct.

19 CHIEF JUDGE WILSON: Really?

20 MR. AMEND: Yes.

21 CHIEF JUDGE WILSON: Okay. Can you explain that?

22 MR. AMEND: Yes, this court read the language
23 that now appears in - - - this is 400.00 (17) of the Penal
24 Law that says that having a license issued under Section
25 400.00, that that - - - having that license is an exemption

1 from prosecution under Article 265 of the Penal Law. And
2 it's cited in our brief - - - I'm sorry, I don't remember
3 the exact cite, but - - -

4 CHIEF JUDGE WILSON: That's People v. Parker?
5 That's People v. Parker, yes?

6 MR. AMEND: Yes. They - - - the facts of that
7 case - - - that case, if I'm recalling it correctly, is
8 that someone had a firearm license for a gun in their home,
9 they were outside of their home on the street, like,
10 threatening to shoot their girlfriend, or I believe it
11 started in some sort of a domestic dispute, and this court
12 held that he could not be prosecuted for possession with
13 intent to use unlawfully because of that license.

14 CHIEF JUDGE WILSON: So let me ask you the same
15 question I've been asking everybody else. Do you know of
16 any prosecutions under 400.00 (15)?

17 MR. AMEND: No. As my colleague stated,
18 licensing violations seem much more naturally to result
19 in - - -

20 CHIEF JUDGE WILSON: Revocation.

21 MR. AMEND: Exactly. A couple of other things
22 that I will say about standing there, according to
23 defendant, he would've been able to get a license under all
24 valid criteria. I would just point out that on the night
25 in question, before he was even arrested, he was carrying

1 in his car a large capacity magazine that exceeded New York
2 limits on - - - on ammunition capacity. He also had the
3 gun loaded in his trunk, which was a violation according to
4 his own testimony of best safety practices. It was also a
5 violation of applicable legal restrictions on the time - -
6 - at the time. So the - - - one of the inquiries that
7 would have been relevant under the good moral character
8 criterion would be firearm safety, and there is at least
9 some evidence that - - - that, you know, suggests that
10 there - - - there - - - there would be questions there.
11 And the idea that this would be any kind of a - - - a
12 simple, or limited remand, or remittal, would - - - is - -
13 - is, I submit, not credible.

14 If I can finally just say one last thing, the
15 reason preservation is important, in addition to all of the
16 things that - - - that counsel had said before me, is it is
17 also a measure of the separation of powers. This court
18 recognized - - - has recognized that striking down a duly-
19 enacted piece of legislation is not something that should
20 occur in the vacuum - - - should occur in a vacuum. It
21 should occur only when there has been full and adequate
22 development of the issue, or at least an opportunity for
23 that in the lower courts, and that is to - - - to hold
24 otherwise in this case, in any of these cases, would be to
25 significantly expand the jurisdiction of this court and I

1 submit that is not something the court should do lightly.
2 Thank you.

3 MR. BOVA: That is something this court has
4 already done in Baker and in Patterson. In Baker, it was
5 not a mode of proceedings error at all, and yet this court
6 held that preservation was excused because the argument was
7 futile given then existing state practice. That is the
8 rule - - - that is the rule that controls this case. The -
9 - - the government attorneys before this court today have -
10 - - although they haven't been saying it, what they're
11 really arguing is that somehow, some way, this court has
12 sub silentio overruled Baker and Patterson.

13 This court, however, has never overruled those
14 cases. All the government can cite to are cases where
15 perhaps futility could've possibly been in play. Perhaps
16 it wasn't, but the decisions say absolutely nothing about
17 futility. That is not a good way to read this court's
18 cases. If this court adopts a futility exception, the way
19 to understand this court's law is to say, is that law on
20 the books and has it been overruled, not to parse records
21 and briefs filed in other cases to see whether possibly
22 this court's silently overruled its own precedent.

23 JUDGE SINGAS: But is that really a fair
24 argument, because given Heller and McDonald, it's a
25 different type of clairvoyance that you would need to say,

1 you know what, the Supreme Court is saying I - - - I - - -
2 I can have a firearm in my home for self-defense, it's not
3 such a huge leap. It's not a Patterson leap to say now,
4 you know what, I think I could carry this gun outside
5 without a license, or I can arm myself, and I can take it
6 outside the house. So I hear what you're saying, but I
7 don't think it's as dramatic as that.

8 MR. BOVA: Well, the - - - the - - - but the
9 argument that was futile was the proper cause challenge.
10 So putting aside the fact, and I know that Hughes has been
11 discussed a lot. Putting aside the fact that Hughes
12 adopted intermediate scrutiny, which I think everyone
13 agrees would've rendered such an argument futile, but
14 putting that aside, the First Department had an iron wall
15 of authority upholding the proper cause licensing standard
16 and the rest of the licensing standards.

17 So any attorney in the - - - at least in the New
18 York City courts, where Mr. Garcia was convicted, would've
19 been completely spinning his or her wheels having made such
20 an objection. And there's no good reason to incentivize
21 those objections.

22 JUDGE RIVERA: Then - - - then wouldn't the
23 proper opportunity have been at the Appellate Division,
24 because it's their rule? It's their interpretation of the
25 law.

1 MR. BOVA: An attorney could ask the Appellate
2 Division to overrule itself, but the states - - -

3 JUDGE RIVERA: Just like it could ask us to
4 overrule - - -

5 MR. BOVA: Right.

6 JUDGE RIVERA: - - - a prior precedent of the
7 court.

8 MR. BOVA: But I think the futility at the - - -
9 the analysis has to - - - failure to raise it in the
10 Appellate Division, that's covered by 470.35 of the CPL,
11 which specifically says that one can raise an argument in
12 this court that has not been raised below. What we're
13 talking about here is whether to excuse the failure to
14 raise it in the trial level. And I don't - - - and I don't
15 think that it is a - - - it is a good use of the taxpayers'
16 money and of the system's resources, to be telling largely
17 public defense offices to send memos around to every
18 attorney working for them that they should start peppering
19 trial courts with futile arguments because perhaps someday
20 the law may change.

21 I think the better - - - the better rule is the
22 rule from Baker and Patterson. And that is also a rule
23 that doesn't choke off a constitutional appellate claim
24 forever and deprive someone of the relief that the courts
25 have now said is available to them.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHIEF JUDGE WILSON: Thank you.

MR. BOVA: Thank you.

(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of George Garcia v. The People of the State of New York, No. 66, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Christy Wright

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: September 22, 2023

